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Ms. Melody White  
U.S. Army Corps of Engineers, Portland District  
Regulatory Branch  
333 SW 1<sup>st</sup> Ave.  
P.O. Box 2946  
Portland, OR 97208-4385

Re: Comments on 2020 NWP Regional Conditions

Dear Ms. White:

Thank you for the opportunity to offer public comment on regional issues concerning the U.S. Army Corps of Engineers (ACOE) published proposal of September 15, 2020 to reissue 52 existing nationwide permits (NWPs) and issue five new NWPs (85 FR 57298). The proposed revisions to the ACOE's NWP program are a matter of public interest for the protection of aquatic resources, and the Pew Charitable Trusts provides the ACOE's Portland District with the following comments on regional issues specific to the proposed reissuance of NWP 48 for Commercial Shellfish Mariculture Activities.

In this letter, we highlight the following issues and offer recommendations regarding the proposed reissuance of NWP 48, with comments specific to:

- regional implications of proposed NWP 48 modifications specific to Oregon;
- inadequacy of draft revisions to the national decision document (COE-2020-0002) for proposed NWP 48<sup>1</sup> specific to individual and cumulative adverse effects; and
- recommendations for additional regional conditions necessary to ensure no more than minimal adverse environmental effects in Oregon.

***We recommend that the Portland District restrict implementation of new NWPs, including NWP 48, until they have adequately addressed the issues raised in this letter and have adopted district-specific regional conditions to ensure the ACOE's ability to reach the minimal adverse effects threshold for Oregon.***

The Pew Charitable Trusts works to advance the protection and restoration of ecologically important coastal habitat, including submerged aquatic vegetation such as eelgrass, which features prominently in our comments. Native eelgrass beds are a type of special aquatic site

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<sup>1</sup> Intended to respond to the October 10, 2019 court order and [ruling](#) issued by the United States District Court, Western District of Washington (Case No. C16-0950RSL and C17-1209RSL)

under Section 404 of the Clean Water Act (33 U.S.C. 1344) and may be affected by activities requiring permits under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), as recognized in the ACOE’s proposal (85 FR 57298). Owing to its ecological importance, seagrass, including eelgrass, is designated as Habitat Areas of Particular Concern (HAPC) for Pacific Coast groundfish and marine and estuarine submerged aquatic vegetation, including eelgrass, as HAPC for Pacific Coast salmon (pursuant to essential fish habitat guidelines at 50 CFR 600.815(a)(8)). Additionally, in Oregon, the regulatory framework for estuary and shoreland resources includes statewide planning goals and associated rules for managing estuaries, the lands bordering estuaries, and ocean shore, which incorporates guidance for regulations and standards to protect shoreland sites that include seagrass (OAR 660, Division 17; OAR 660, Division 37). Further, Oregon’s statewide planning goal and guidelines for ocean resources provide implementation requirements that are protective of important marine habitat, including many categories of protection that extend to eelgrass (OAR 660-015-0010(4)), and the Oregon Department of State Lands removal/fill law includes native eelgrass beds as an aquatic habitat of concern (OAR 141, Division 85).

### **Regional Implications of Proposed NWP 48 Modifications**

We raise two regional implications of proposed NWP 48 modifications specific to Oregon, regarding: (1) compliance with programmatic ESA Section 7(a)(2) and EFH consultation; and (2) an uncertain finding of minimal individual and cumulative adverse environmental effects.

#### Compliance with ESA Section 7(a)(2) and EFH Consultation

We question whether the ACOE’s proposed modifications to NWP 48 complies with the Service’s programmatic consultation for shellfish aquaculture activities in Oregon pursuant to section 7(a)(2) of the Endangered Species Act (ESA) and section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and guidelines for Essential Fish Habitat (EFH) consultation (NMFS 2014, Re: NMFS Consultation No. WCR-2014-825). The ACOE’s proposed modifications to NWP 48 create discrepancies that would cause effects not considered in NMFS’ prior consultation. Specifically, the ACOE proposal removes the definition of “new commercial shellfish aquaculture operation” that it previously adopted as well as removing a relevant limit (½-acre limit for impacts to submerged aquatic vegetation in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years).

Absent identifying “new commercial shellfish aquaculture operation” as a separate management category, it is unclear how the Portland District will know when to condition applications pursuant to NWP 48 with relevant program administration and design criteria required by the NMFS’ consultation that include criteria specific to “new” activities. As established in the consultation, the application of project design criteria<sup>2</sup>, including for new shellfish aquaculture

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<sup>2</sup> The [consultation](#) identifies:

- Program Administration procedures for rollout; the consequence of failure to report; electronic action notification, review and approval; permit conditions; site access; and annual program reporting and meeting requirements are located on pages 10-13;

operations, must be adhered to in order for an activity to be compliant with the consultation. Specifically, the Service’s consultation states that the ACOE, “...will include each of the relevant project design criteria as an enforceable condition of every action authorized under this programmatic consultation. Failure to comply with all applicable conditions for a specific project may lead NMFS to a different conclusion regarding the effects of that project.” Absent the Portland District’s ability to ensure adherence to requirements for program administration and project design criteria effectively, additional effects including increased suppression and physical damage of eelgrass not previously considered in the consultation would surely occur, which is the mechanism for adverse effects to EFH designated for Pacific salmon and groundfish. As depicted in the EHF consultation, reduced eelgrass density and spatial cover resulting from suppression and physical disturbance can reasonably be expected to reduce the quantity and quality of natural cover and forage for Pacific salmon and groundfish (NMFS 2014).

#### Uncertain Finding of Minimal Individual and Cumulative Adverse Environmental Effects

Further, the ACOE proposed removal of pre-construction notification (PCN) thresholds and requirements for NWP 48 has the potential to affect PCN practices and requirements to notify NMFS<sup>3</sup> in Oregon. Absent definitive requirements of PCNs for NWP 48 applicants, there is uncertainty regarding the ACOE’s ability to add special conditions through its PCN verifications or provide NMFS with accurate notification, which pending the adoption of additional regional conditions, are the only mechanisms for adding post-issuance procedures by division or district engineers to mitigate adverse effects to eelgrass (85 FR 57298). Without assurance that the ACOE has effective processes in place to add such special conditions, the ACOE’s ability to ensure that its implementation of NWP 48 will result in no more than minimal individual and cumulative adverse environmental effects is highly uncertain.

These regional implications of the proposed NWP 48 modifications call into question both the ACOE ability to comply with existing programmatic ESA and EFH consultations and ensure a finding of no more than minimal individual and cumulative adverse environmental effects, specifically within Oregon. ***For these reasons, we recommend that the ACOE apply additional regional conditions to ensure no more than minimal individual and cumulative adverse effects on Oregon’s aquatic environment, as further discussed below.***

#### **Inadequacy of Draft Revisions to Address District Court Decision**

Following review of the ACOE national decision document (COE-2020-0002) for proposed NWP 48, we find inadequate the cumulative effects analysis that intended to support a more rigorous finding of no more than minimal individual and cumulative adverse environmental

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- Project Design Criteria for equipment storage and pump requirements; toxic compounds, chemicals, and other contaminants; native shellfish bed restoration; eelgrass avoidance; newly positioned equipment and operations within existing farms; new/expanded farms; forage fish; and mechanical harvest requirements on pages 13-16; and
  - Relevant EFH conservation recommendations on pages 33-34.

<sup>3</sup> Per requirements 3 and 4 of the programmatic [consultation](#)’s program administration procedures (page 11).

effects, responsive to the October 10, 2019 court order holding NWP 48 unlawful in the State of Washington. The analysis continued to put forward conclusory statements regarding the ‘minimal adverse effects’ finding that were not quantified; in many cases not substantiated by the literature; and in some cases, provided misleading interpretation of the literature on the whole. Further, the analysis did not give consideration to the ongoing effects of past actions when conducting the cumulative impacts analysis, which is relevant in particular to impacts on eelgrass. Because we expect we are not alone in expressing these sentiments and to keep our comments more focused on specific recommendations for the Portland District, we will not go into detail on these points, but raise the issues as important to resolve fully before a final rule is made. *To this end, we recommend further enhancing the draft decision document’s analysis to address the issues raised above. Specifically, we suggest that review of NMFS programmatic consultations for shellfish mariculture in both Oregon and Washington is needed to develop rigorous effects analysis, including cumulative effects and quantified impacts to eelgrass and other dependent aquatic resources (NMFS 2014, NMFS 2016).*

### **Recommended Additional Regional Conditions**

With these recommendations, we take under consideration the ACOE statement in its proposed rule that regional conditions are an effective tool to ensure NWPs authorize activities that result in no more than minimal individual and cumulative adverse effects on the aquatic environment (85 FR 57298). Further, we take under consideration the ACOE stated belief that, “...ESA section 7 consultations, EFH consultations under the Magnuson-Stevens Fishery Conservation and Management Act, and regional conditions imposed by division engineers to restrict or prohibit the use of NWP 48 are appropriate avenues to address impacts to submerged aquatic vegetation that may be caused by activities authorized by NWP 48” (85 FR 57298). With these sentiments in mind and given our preceding comments, we strongly recommend that the Portland District issue additional regional conditions to ensure NWPs cause no more than minimal individual and cumulative adverse effects on Oregon’s aquatic resources of special concern.

Specifically, with respect to the Portland District’s proposed regional conditions for 2020 NWPs and relevant, previously issued regional conditions for NWPs<sup>4</sup>, we appreciate the Portland

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<sup>4</sup> Portland District of Oregon, Regional Condition 1 for 2012 NWPs: 1. High Value Aquatic Resources: Except for NWPs 3, 20, 27, 32, 38, and 48, any activity that would result in a loss of waters of the United States (U.S.) in a high value aquatic resource is not authorized by NWP. High value aquatic resources in Oregon include bogs, fens, wetlands in dunal systems along the Oregon coast, native eel grass (*Zostera marina*) beds, kelp beds, rocky substrate in tidal waters, marine reserves, marine gardens, vernal pools, alkali wetlands, and Willamette Valley wet prairie wetlands. NOTE: There are other types of wetlands in Oregon, such as mature wooded wetlands and tidal swamps, which are also considered as providing high value and functions to the State’s aquatic ecosystems. Impacts to these waters will be evaluated on a case-by-case basis for potential authorization under a Nationwide Permit. For more information about the State’s Wetlands of Conservation Concern” please visit [http://www.oregon.gov/dsl/PERMITS/docs/wet\\_land\\_cons\\_concern.pdf](http://www.oregon.gov/dsl/PERMITS/docs/wet_land_cons_concern.pdf).

Portland District of Oregon, Regional Condition 2 for 2017 NWPs (that applies to all NWPs for the State of Oregon). “Aquatic Resources of Special Concern: Pre-construction notification to the District Engineer is required for all activities proposed in waters of the U.S. within an aquatic resource of special concern. Aquatic resources of special concern are resources that are difficult to replace, unique, and/or have high ecological function. For the purpose of this regional condition, aquatic resources of special concern are native eelgrass (*Zostera marina*) beds,

District's proposed continuance of regional condition 2 relative to 2020 NWP's, which is specific to aquatic resources of special concern. It is critical that the District Engineer receives ample, pertinent information specific to aquatic resources of special concern, including eelgrass, when determining whether an applicant's proposed activities are more than minimal. However, an expedited permit process may not be the most appropriate permit pathway to maintain healthy subaquatic vegetation and ensure persistence of the functions eelgrass provides, which are disproportionate to the area it encompasses in aquatic systems<sup>5</sup>. ***We recommend the Portland District create an additional regional condition to disallow use of NWP's if the project impacts eelgrass beds, similar to the 2012 version of regional condition 2, while adding the requirement of PCN's to the list of exempted NWP's, as in the proposed 2020 condition language that applies to all aquatic resources of concern***<sup>6</sup>.

Additionally, we recommend that the Portland District issue a district-specific regional condition necessary to facilitate compliance with the "Endangered Species" general condition, to appropriately enhance protection of listed species and/or critical habitat under the Endangered Species Act. A regional condition that facilitates ESA compliance is recognized as an example category of ACOE regional condition in its proposed rule (85 FR 57298) and would go a long

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mature forested wetlands, bogs, fens, vernal pools, alkali wetlands, wetlands in dunal systems along the Oregon coast, estuarine wetlands, Willamette Valley wet prairie wetlands, marine gardens, marine reserves, kelp beds, and rocky substrate in tidal waters. In addition to the content requirements of NWP General Condition (GC) 32, the preconstruction notification must include a statement explaining why the effects of the proposed activity are no more than minimal. Written approval from the District Engineer must be obtained prior to commencing work. Note: If the District Engineer determines that the adverse effects of the proposed activity are more than minimal, then the District Engineer will notify the applicant that either: (a) the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) the activity is authorized under the NWP subject to submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) the activity is authorized under the NWP with specific modifications or conditions."

[https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/nationwide/NWP\\_Regional\\_Permit\\_Condition\\_01DEC17.pdf](https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/nationwide/NWP_Regional_Permit_Condition_01DEC17.pdf)

<sup>5</sup> Sherman, K., and L.A. DeBruyckere. 2018. [Eelgrass habitats on the U.S. West Coast. State of the Knowledge of Eelgrass Ecosystem Services and Eelgrass Extent](#). A publication prepared by the Pacific Marine and Estuarine Fish Habitat Partnership for The Nature Conservancy.

<sup>6</sup> Proposed Portland District Regional Condition 2. Aquatic Resources of Special Concern: Pre-construction notification to the District Engineer is required for all activities proposed in waters of the U.S. within an aquatic resource of special concern. Aquatic resources of special concern are resources that are difficult to replace, unique, and/or have high ecological function. For the purpose of this regional condition, aquatic resources of special concern are native eel grass (*Zostera marina*) beds, mature forested wetlands, bogs, fens, vernal pools, alkali wetlands, wetlands in dunal systems along the Oregon coast, estuarine wetlands, Willamette Valley wet prairie wetlands, marine gardens, marine reserves, kelp beds, and rocky substrate in tidal waters. In addition to the content requirements of NWP General Condition (GC) 32, the preconstruction notification must include a statement explaining why the effects of the proposed activity are no more than minimal. Written approval from the District Engineer must be obtained prior to commencing work. Note: If the District Engineer determines that the adverse effects of the proposed activity are more than minimal, then the District Engineer will notify the applicant that either: (a) the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) the activity is authorized under the NWP subject to submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) the activity is authorized under the NWP with specific modifications or conditions.

<https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/announcements/CombinedReissuanceofNationwidePermits.pdf>

way to helping ensure no more than minimal individual and cumulative adverse effects on the aquatic environment. ***Specifically, we recommend an ESA compliance regional condition should make explicit the required project design criteria of the Service’s programmatic consultation<sup>7</sup>, as well as clarify that PCNs are a requirement for all NWP applicants in Oregon, given that there is potential to adversely affect EFH and eelgrass-related HAPC throughout Oregon waters where authorized activities occur<sup>8</sup>.***

In summary, our recommended additional regional conditions are in line with the ACOE current statements regarding intended purposes of regional conditions and help ensure a ‘minimal adverse effects’ finding. Without such additional conditions we believe the ACOE proposed rule fails to ensure no more than minimal individual and cumulative adverse effects on Oregon’s aquatic environment.

### **Conclusion**

We thank the ACOE and its Portland District for their ongoing efforts to involve the public in the development of NWPs and other permitting programs, and sincerely hope that our comments provide insights that help the ACOE meet its obligations to protect aquatic resources in Oregon. We look forward to continuing to participate in ACOE and other federal and state agency efforts to protect ecologically important coastal habitat and conserve marine life, here in Oregon, and across the Nation.

Sincerely,



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<sup>7</sup> The [consultation](#) identifies:

- Project Design Criteria for equipment storage and pump requirements; toxic compounds, chemicals, and other contaminants; native shellfish bed restoration; eelgrass avoidance; newly positioned equipment and operations within existing farms; new/expanded farms; forage fish; and mechanical harvest requirements on pages 13-16.

<sup>8</sup> Consistent with conservation recommendations of the EFH [consultation](#):

- Minimize adverse effects due to authorizing shellfish activities by ensuring that all actions use the design criteria described in the proposed action, as appropriate. Fully implementing this EFH conservation recommendation would protect, by avoiding or minimizing the adverse effects, approximately 5,277 acres of designated EFH for Pacific coast groundfish, coastal pelagic species, and Pacific salmon, including seagrass and estuarine HAPCs.